COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 011531-03**

Sandra D. Tessier Employee
Shriver Nursing Services, Inc. Employer
Granite State Insurance Company Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Carroll and Costigan)

APPEARANCES
Paul P. Rigopoulos, Esq., for the employee
David G. Shay, Esq., for the insurer at hearing and on appeal
William C. Harpin, Esq., for the insurer on appeal

FABRICANT, J. The insurer appeals from an administrative judge's award of ongoing § 34 total incapacity benefits. The insurer argues that the judge failed to make sufficient vocational findings and misstated the employee's testimony regarding her physical limitations. We disagree, and affirm the decision.

Sandra Tessier, age forty, injured her back on April 6, 2003, while lifting a handicapped child at her job as a licensed practical nurse. Since that time, she has been out of work due to "debilitating back pain from her mid to low back." (Dec. 3.) She requires "significant narcotic medication" and rest during the day, and her sleep and daily activities, such as cooking, housework, cleaning, laundry, vacuuming and driving, are compromised due to pain. Id.

Dr. Richard Selbst examined the employee pursuant to § 11A. He opined that she had sustained a back sprain at work and was indefinitely medically disabled. He found that she had the ability to perform a sedentary job as long as she did not lift more than twenty pounds, did not push or pull anything heavy, did not perform repetitive bending, and did not stand or sit for more than two or three hours without a break. (Dec. 4; Impartial Dep. 17-20.) He further opined that her medication would restrict her from working as a nurse, and, assuming her pain as she described it continued and worsened, her prognosis was guarded. (Dec. 4; Imp. Dep. 27.) Although the judge adopted Dr.

Selbst's opinion as to partial medical disability,[1] he ultimately found that the employee was "completely incapacitated from any work of a remunerative nature" based upon her testimony regarding her pain and limitations, her vocational history of heavy exertional work, and her education. (Dec. 5.)

The insurer contends that the judge concluded that the employee did not "possess the necessary vocational skills to perform any realistic, existing and suitable job," (Dec. 5), without performing any real vocational analysis. This contention ignores the lengthy findings the judge made in coming to this conclusion. The judge began by describing the employee's education (she left school in the tenth grade and subsequently obtained a GED), and her work history (hairdresser, military quartermaster, firefighter, and licensed practical nurse). He then detailed the physical requirements of her various jobs:

> Her work since 1984 has been strenuous and exertional requiring daily lifting, bending, walking, squatting, kneeling, lifting, pushing/pulling and constant movements loading vehicles, performing field services, fighting fires, assisting disabled elderly and pediatric patients. Furnishing pediatric nursing care since 2000 has required bathing, feeding, dressing, medicating, changing and carrying and lifting and positioning handicapped children weighing 30 to 150 pounds.

(Dec. 3.) Finally, crediting the employee's testimony as to her pain and symptomatology, the judge analyzed how the medical and vocational elements combined to impact her ability to work:

> I accept her credible testimony and the medical opinion of Dr. Selbst and I find that all of her prior work required lifting in excess of 20 pounds on a sustained basis and that even if she can take breaks from the same postural sedentary position during each two to three hour period she does not possess the necessary vocational skills to perform any realistic, existing and suitable job. I find that she does not have the physical capacity within the restrictions furnished by Dr. Selbst to perform work as a hairdresser or her prior exertional and strenuous work because her debilitating back pain excludes her from lifting more than 20 pounds and bending forward. She requires constant rest and narcotic pain medication and cannot drive but occasionally, or assist bedridden patients. There is no physical postural position the employee does—even sitting—that does not produce debilitating back pain.

[1] He also adopted the opinion of Dr. John Katzenburg that the employee was partially medically disabled during the "gap" period prior to the impartial examination.

> I find the employee cannot do her prior work and has no transferable vocational skills to perform any work within the restrictions opined by Dr. Selbst and Dr. Katzenburg. She is excluded since April 6, 2003 from the real world of work.

(Dec. 5-6.) The judge did much more than merely incant the vocational factors of age, education, training, and work experience enunciated in Frennier's Case, 318 Mass. 635, 639 (1945), and Scheffler's Case, 419 Mass. 251, 256 (1994), or perform merely a "brief" vocational analysis. See Borawski v Gencor Indus., 17 Mass. Workers' Comp. Rep. 542, 547 (2003). He made in-depth findings addressing these factors. His determination that the employee is totally incapacitated from work clearly emerges "from the matrix of [these] subsidiary findings," Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993), and we therefore affirm it.

The insurer also argues that the judge misstated evidence of the employee's physical limitations and pain by finding that she "requires constant rest," "cannot drive but occasionally," and has "debilitating pain." (Dec. 5.) The insurer complains that the judge improperly used these misstatements to override the impartial examiner's opinion of partial medical disability. As in Frager v. M.B.T.A., 17 Mass. Workers' Comp. Rep. 538, 540 (2003), the differences between the employee's testimony and the judge's findings are insubstantial. She testified, "[t]here's nothing that I can do without having pain. It's constant." (Tr. 59.) From this, the judge could reasonably infer her pain was debilitating. Where a judge credits an employee's complaints of disabling pain, we have upheld a finding of total incapacity, even in the face of an impartial opinion that the employee can work with restrictions. Auclair v. Marshalls, 17 Mass. Workers' Comp. Rep. 522, 525-526 (2003); Anderson v. Anderson Motor Lines, Inc., 4 Mass. Workers' Comp. Rep. 65, 68 (1990).

The employee also testified that she must lie down three or four times a day for unspecified periods of time, (Tr. 60), and that she cannot "drive for extended long periods of time." (Tr. 44.) While the judge's findings do not mirror precisely the employee's testimony, the differences are de minimus, and are not, in any case, contradictory or determinative. Moreover, the judge clearly found that the employee's prior jobs were all

outside the restrictions imposed by Dr. Selbst, and that she lacked the transferable vocational skills to find work within those medical restrictions. (Dec. 5-6.) His conclusion that the employee was totally incapacitated, even though Dr. Selbst opined she had a sedentary work capacity, was thus entirely proper. Cugini v. Town of Braintree School Dep't, 17 Mass. Workers' Comp. Rep. 363, 366-367 (2003), and cases cited.

Accordingly, we affirm the decision of the administrative judge. Pursuant to § 13A(6), we order the insurer to pay employee's counsel a fee of $1,357.64.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: